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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1951.

No. ————

THE HAMILTON FOUNDRY AND MACHINE COMPANY,

Petitioner,

vs.

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, (AFL),

and

LOCAL NO. 68, INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA (AFL),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioner, The Hamilton Foundry & Machine Company, respectfully prays that a writ of certiorari issue to the Court of Appeals for the Sixth Circuit to review the judgment of that Court in this case.

OPINIONS BELOW

The opinion of the District Court (R. 291-302) is reported in 95 F. Supp. 35. The opinion of the Court of Appeals (R. 319-329) is reported in 193 F. (2d) 209.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

The judgment of the Court of Appeals for the Sixth Circuit, which petitioner seeks to have reviewed, was entered December 11, 1951. (R. 318). A petition for rehearing seasonably filed was overruled on January 23, 1952. (R. 353).

QUESTIONS PRESENTED

1. In view of the provisions of Section 301 of the Labor Management Relations Act, 1947 (29 USC 185) that a labor organization "shall be bound by the acts of its agents" and that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling", were Respondent Unions bound by the notification of contract acceptance communicated to Petitioner on March 26, 1949 by an admitted agent of Respondents who was a member of Respondents' bargaining committee and who was apparently authorized and expressly authorized to communicate such message of acceptance to Petitioner?

2. May the right of a party to a collective bargaining agreement negotiated under the compulsion of the Labor Management Relations Act, 1947 (29 USC 141, et seq.) to recover damages against the other party for breach of contract in an action brought under Section 301 of such Act, be barred by a state statute of frauds remedial in character?

3. Under the provisions of the Seventh Amendment, is a party to a contract in an action for damages entitled to

a jury determination of (a) the issue as to whether its offer for an agreement was accepted by the other party, and (b) the issue as to the duration of the alleged contract, evidence having been introduced on each issue which was in and of itself substantial?

4. Under the provisions of Rule 10(c) of the Federal Rules of Civil Procedure, does a date stated in an exhibit attached to a pleading control even though in the pleading it is alleged in substance that the date stated in the exhibit is incorrect, and that a different date will be proved by Petitioner, and even though a different date was proved at the trial?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

The pertinent Constitutional Amendment and Statutes are printed in Appendix A of this petition.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This was an action by an employer to recover money damages from two unions for breach of a labor contract. The action was brought by Petitioner against Respondents under the provisions of Section 301 of the Labor Management Relations Act, 1947 (29 USC 185). The jury returned a verdict for Petitioner against both Respondents in the amount of $37,500, and judgment was entered thereon. (R. 287-288). Subsequently, acting in response to motions filed by Respondents, the Trial Court ordered the verdict and judgment set aside and entered final judgment for Respondents, and in the alternative, a new trial. (R. 304-306). Petitioner appealed and the Court of Appeals for the Sixth

Circuit affirmed the entry of final judgment for Respondents. (R. 318). Subsequently, in response to a petition for rehearing filed by Petitioner, the Court of Appeals amended its opinion in one respect and in all other respects denied such petition for rehearing. (R. 353).

The evidence showed that on Thursday, March 24, 1949, after protracted negotiations, Petitioner presented to a bargaining committee representing Respondents a partly written and partly oral proposal for a new contract to govern wages, hours and working conditions in the bargaining unit. This proposal included a no-strike clause. It was agreed that Respondents' committee would present this proposal with its recommendation of approval at a meeting of Petitioner's employees who were members of Respondent Local (an amalgamated union) and that this meeting would be held on Friday night, March 25, 1949. It was further agreed that Merle McCune, District Representative of Respondent International and a member of the bargaining committee, would notify Petitioner on the following morning, Saturday, March 26, as to whether the proposal had been accepted, or rejected. It was agreed that, if accepted, all provisions of the proposal including the wage increase would be put into effect the following Monday morning, March 28, and that the contract would be reduced to writing and signed at a later date at the convenience of the parties. (Exhibit 8, pages 68-69; 98-99; R. 145, 177).

At the Union meeting on Friday night, Petitioner's employees voted to accept the proposal. (R. 210; 217; 227). On Saturday morning, March 26, Respondents' representative, McCune, telephoned Petitioner and notified Petitioner that the proposal had been accepted. (R. 64). In this telephone conversation it was agreed that McCune and his fellow committee members would come to Petitioner's

plant on the following Wednesday, March 30, and sign the contract. (R. 65).

Petitioner put the new wage scale and other conditions of the contract into effect on Monday morning, March 28. (R. 70, 103). At the trial, evidence was introduced indicating that dissatisfaction with the new agreement was expressed by employees at the regular Monday night meeting of Respondent Local, and that the action taken at the Friday night meeting "had been rescinded." (R. 103). Conferences ensued between the parties. On Wednesday, March 30, Respondents' committee refused to sign the document embodying the agreement which had been reached (R. 103-104), and on April 4, 1949 Respondents called Petitioner's employees out on strike in violation of the no-strike clause in the agreement to Petitioner's great damage. (R. 77; 128-129; Exhibit 23).

In affirming the judgment of the District Court against Petitioner, the Court of Appeals disagreed with the District Court's ruling against Petitioner in five basic particulars (R. 323-325), but agreed with the District Court that "the action of the employees at the Friday night meeting at its best represented the action of appellant's employees who were members of Local No. 68, and did not represent the official action of the Union," and that, despite the provisions of Section 301 of the Labor Management Relations Act 1947 (29 USC 185) and the evidence in the case, a jury could not find that Petitioner's offer was ever accepted by Respondents, or either of them. The Court of Appeals also held that Petitioner's action was one to enforce an oral agreement, that such agreement could not be performed within one year (a point which was not decided by the District Court) and that the action, although brought under the provisions of Section 301 of the Labor Management Relations Act, 1947, was barred by the Ohio statute of frauds. (G. C. 8621; R. 327-329).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding, despite the provisions of Section 301 of the Labor Management Relations Act, 1947 (29 USC 185) that the notification to Petitioner by Respondents' authorized agent of acceptance of Petitioner's offer for an agreement did not constitute acceptance by the Respondents in the absence of evidence that the acceptance was actually ratified by the membership of Respondent Local 68, an amalgamated union.

2. In holding that in an action brought under Section 301 of the Labor Management Relations Act, 1947 (29 USC 185) to enforce an agreement reached under the compulsions and procedures of Section 8 of such Act, recovery is barred by the Ohio statute of frauds. (G. C. 8621).

3. In holding that Petitioner was not entitled under the Seventh Amendment to a jury determination of (a) the issue as to whether Petitioner's offer for an agreement was accepted by Respondents, and (b) the issue as to the duration of the alleged contract, evidence having been introduced on each issue which was in and of itself substantial.

4. In holding that the expiration date stated in an exhibit attached to Petitioner's pleading controlled even though in the pleading it was alleged in substance that a different date would be proved by Petitioner and even though a different date was proved at the trial.

5. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been and Should Now Be Settled By This Court.

(a) The Court has not yet interpreted the meaning of Section 301 (b) of the Labor Management Relations Act, 1947, which states that any labor organization in commerce "shall be bound by the acts of its agents", or the provision of Section 301(e) which says that:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question as to whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

There is also an identical provision in Section 2 (13) of the Act. From the language of the Act quoted above, read in the light of the provisions of Section 8(a)(5), 8(b)(3) and 8(d) of the Act, it would appear that Congress intended that a contract should be created whenever an employer was notified by an authorized union agent that the employer's offer for a contract was accepted by the union. The Court of Appeals decided to the contrary.

In their answers in this case Respondents admitted that the committee to which the Petitioner submitted its proposal on March 24, 1949 was a "committee representing defendant, International Molders and Foundry Workers Union of North America, Local 68." (R. 10, 16). McCune, the District Representative of Respondent International, was admittedly a member of the negotiating committee. (R. 161; 163; 187). He had served as union spokesman on

past occasions, he had notified Petitioner of rejections of previous proposals, arranged meetings, and was the only member of the committee who regularly communicated with Petitioner on such matters. (R. 100-101; 109-112). At the bargaining meeting on March 24, it was agreed that McCune would call Petitioner on Saturday morning and notify Petitioner of the results of the Friday committee meeting. (R. 111; 114; 159). It was also admitted that the notification which McCune was to give Petitioner on Saturday morning was "whether the proposal had been accepted or rejected." (R. 177). On Saturday morning, March 26 he notified Petitioner that the proposal had been *accepted* and that it would be all right to put the new agreement into effect on the following Monday, March 28. (R. 64). *If the provisions in Section 301(b) that a labor organization "shall be bound by the acts of its agents" is to have any meaning at all, it would seem that a contract was made when the above notification of acceptance was received by Petitioner from Respondents' agent.*

The Court of Appeals conceded the invalidity of Respondents' contention that there could be no contract until signature, and that:

> "The testimony of McDaniel and Rentschler to the effect that it was agreed that the contract was to be in effect upon oral notification that it had been accepted, and that the signing would follow later, was sufficient to take this issue to the jury." (R. 324).

Nevertheless, the Court of Appeals went behind McCune's notification and held that "Local No. 68 did not, by any action of its own, accept the contract." (R. 326). The Court said it did not find the "necessary evidentiary basis to support the contention" that the committee had authority to bind Respondent to the contract "prior to its ap-

proval by the Local itself, or represented to the Company that they had such authority." (R. 326; 353). Under Section 301(b), however, an agent such as McCune has authority to bind the Union even if he had not been actually authorized by it to do so and even though he had not affirmatively represented to Petitioner that he had such authority. Such authority derives from his postion as a bargaining representative of a labor organization which has chosen to accept the privileges and responsibilities of an exclusive bargaining agency under the provisions of the Labor Management Relations Act, 1947. This decision not only conflicts with the language of Section 301(b), but also conflicts with the express language of Section 301(e) quoted above.

(b) Another vital question of Federal law raised by the decision which should now be settled by this Court is whether an action brought under Section 301 is subject to the restrictions of state remedial legislation, such as the Ohio statute of frauds, bearing in mind that Section 8 (a) (5) requires an employer to bargain with a union, and that Section 8(d) requires "the execution of a written contract incorporating any agreement reached if requested by either party." In the instant case Petitioner had requested the execution of a written contract.

Petitioner contends that the Ohio statute of frauds is inapplicable, because Section 301 creates a Federal substantive cause of action not subject to state limitations (*Shirley-Herman* v. *International Hod Carriers Union* (CA 2; 1950 182 F. (2d) 806), and because Section 8(d) makes signature of collective bargaining agreements mandatory and, therefore, obviates the necessity of actual signature in order to comply with the state statute of frauds.

(c) The case also presents an important Federal question relating to the meaning of Rule 10(c) of the Federal Rules of Civil Procedure which states that:

> "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

The Court of Appeals found, as a matter of law, that Petitioner, by attaching an exhibit to its pleading and stating that "the full terms and conditions contained in the alleged contract are set forth in Exhibit A, attached hereto and made a part hereof, with the following changes:
* * * The termination date of the contract is midnight, March 26, 1950" (R. 22-23) was conclusively bound by a different expression of the date which was contained in the exhibit. (R. 328).

2. The Decision of the Court of Appeals Conflicts Directly with Decisions of Two Other Courts of Appeals on the Same Matters.

(a) The decision of the Court of Appeals in this case conflicts with the decision of the Court of Appeals for the Third Circuit in *Rothenberg* v. *Rothstein* (CA 3; 1950) 183 F. (2d) 524. In the *Rothenberg case* it was held that the Pennsylvania statute of frauds did not apply to an action brought under the Federal Perishable Agricultural Commodities Act (7 USC 499, et seq.) This Act contains provisions very similar to those of Section 301. The Court of Appeals held that such provisions created a Federal substantive right. The Court said:

> "We find nothing in the federal act which would suggest that the remedy conferred by Section 5 upon an injured party to a contract of sale of perishable agricultural commodities shall not be available if under the laws of the particular state which is involved a suit on the contract could not have been maintained in the state courts. On the contrary it is apparent that the federal act in-

> tends to grant a new remedy which is not dependent upon but in addition to such other remedies as may be available to the parties at common law or by the statutes of any state." (page 528).

Petitioner believes that these words are equally applicable to the Labor Management Relations Act, 1947. Both the Pennsylvania statute of frauds and the Ohio statute of frauds have been held to be remedial in nature. A further comparison of the two decisions may be found in Petitioner's petition for rehearing below. (R. 344-348). The conflict between the decisions of the two circuits on this basic point is an important one and should be resolved by this Court. It should be noted that the decision in the *Rothenberg case* was rendered by the Court of Appeals for the Third Circuit after a special rehearing before a full bench of six judges who rendered a unanimous decision participated in by a jurist renowned as an authority on the law of conflict of laws.

(b) The decision in this case also conflicts with the decision of the Court of Appeals for the Seventh Circuit in *NLRB* v. *Acme Mattress Company* (CA 7; 1951) 192 F. (2d) 524. In the latter case it was held that under the provisions of Section 2 (13) of the Act (29 USC 152 (13)), which is identical to Section 301 (e), a union was bound by contract terms communicated to an employer by the union's business representative even though such terms had not been actually authorized or ratified by the union membership. This latter decision is in accord with the National Labor Relations Board's own interpretation of the Act. In *Sunset Line and Twine Company,* 79 NLRB 1487, at page 1508, the National Labor Relations Board stated:

> "A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the 'scope of his employment' if the

agent is a servant, even though the principal has not specifically authorized, or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted."

3. The Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of This Court.

The Court of Appeals held, as a matter of law, that (a) there was no acceptance of the contract by the Union, and (b) the proposal, if accepted, was for a contract lasting longer than a year, despite clear and substantial evidence on each point to the contrary.

(a) On the issue of acceptance the Court of Appeals first held that *"we find no substantial evidence, considering the record as a whole,* to sustain the contention" that the committee had any authority to bind the Local until the contract had been approved at a regular weekly meeting of the Local which was held on Monday night, March 28. (R. 326). When it was pointed out in the petition for rehearing that the phrase "considering the record as a whole" was not the standard applicable to jury cases under the Seventh Amendment, (R. 334-336) the Court of Appeals deleted this phrase and substituted the words, "We do not find the necessary evidentiary basis to support the contention." (R. 353).

This finding is seriously erroneous because there was ample evidence in the record that the vote at the employees' meeting on Friday night, March 25, was to be decisive and that no subsequent ratification was required. The Constitution and by-laws of the Respondent Unions did not require approval by the membership, or notification, as a

condition precedent to obligation. (Exhibits 20, 21). Petitioner's bargaining representatives testified that Petitioner was never told at any time that there would have to be a ratification at a membership meeting of Local 68 before there could be an agreement. (R. 203-204). McCune testified that Petitioner's employees who were to meet on Friday night, March 25, were the group to which the committee was going to take the proposal for acceptance or rejection. (R. 171). The International President of the Union, who was also a member of the committee, advised Petitioner during negotiations that these employees of Petitioner who were to attend the Friday night meeting "are the ones who are voting as to the acceptance or rejection of this agreement." Exhibit 8, page 58). Another committee member stated that the International President announced that "the vote of your people who work in the Hamilton Foundry on Friday night would determine whether the contract was to be accepted or rejected." (R. 199-200). The International President testified that on March 24 he advised Petitioner that the matter would be presented to the membership for decision and that by "membership" he meant "those employed in The Hamilton Foundry & Machine Company who were members of Local 68." (R. 145). He was then asked specifically whether by "membership" he meant "Local 68" and his answering words were "No. We was to notify the company as to what the decision of those employees would be on Friday night. The Local didn't meet until the following Monday night." He added that "we told the company after we have this meeting with the employees, you will be notified as to their decision." (R. 145). Such evidence, and other which cannot be quoted here because of space limitations, clearly constituted "the necessary evidentiary basis to support the contention" that the acceptance approved by

the membership Friday night, and communicated to Petitioner Saturday morning by McCune, was acceptance of Petitioner's proposal by Respondents.

(b) Exhibit 19 stated that the expiration date of the agreement would be "March 13, 1950," which was substantially less than a year from the date of acceptance on March 26, 1949. The bargaining records contained the entire negotiations and established beyond question that the offer in this respect was never changed. There was, therefore, a clear evidentiary basis from which the jury could have found that the agreement was for less than a year, in which event the Ohio statute of frauds could not possibly have been applicable.

(c) This Court has been diligent in protecting the right to a jury trial guaranteed by the Seventh Amendment. In *Tennant* v. *Peoria Railroad* (1944) 321 U. S. 29, the question of a right to a jury trial was also before this Court. In reversing the lower court because of a denial of this right, this Court stated:

> "No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

In *Lavender* v. *Kurn* (1946) 327 U. S. 645, 653, in which the evidence presented to the jury was less substantial than that summarized above, this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary in-

ference or feel that another conclusion is more reasonable."

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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J. MACK SWIGERT,
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Of Counsel.
April 15, 1952.

APPENDIX A

Constitutional Amendment and Statutes

AMENDMENT 7, UNITED STATES CONSTITUTION

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 5, Federal Perishable Agricultural Commodities Act (7 USC 499e)

"(a) If any commission merchant, dealer, or broker violates any provision of section 499b of this chapter he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies. June 10, 1930, c. 436, § 5, 46 Stat. 534; Aug. 20, 1937, c. 719, § 7, 50 Stat. 728."

Section 8 (a) (5), Labor Management Relations Act 1947 (29 USC 158 (a) (5)

"(a) It shall be an unfair labor practice for an employer—

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 8(b) (3), Labor Management Relations Act 1947 (29 USC 158(b) (3)

"(b) It shall be an unfair labor practice for a labor organization or its agents—

***

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title."

Section 8(d), Labor Management Relations Act 1947 (29 USC 158(d)

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any

State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, and provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later;

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. As amended June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1 (b), 65, Stat. 601."

Sections 301, Labor Management Relations Act (29 USC 185)

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy

or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, 3:17 p.m., E. D. T., c. 120; Title III, § 301, 61 Stat. 156."

Ohio General Code, Section 8621.

"No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default or miscarriage, of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in, or concerning them, nor upon an

agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

Rule 10(c), Federal Rules of Civil Procedure.

"Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

Section 2(13), Labor Management Relations Act 1947 (29 USC 152(13)

"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. As amended June 23, 1947, 3:17 p.m., E. D. T., c. 120, Title I, § 101, 61 Stat. 137.

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CHARLES ELMORE CROPL

No. 724

In The

Supreme Court of the United States

October Term, 1951

THE HAMILTON FOUNDRY & MACHINE COMPANY,

Petitioner,

vs.

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, (AFL),

and

LOCAL No. 68, INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA (AFL),

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1951

No. 724

THE HAMILTON FOUNDRY & MACHINE COMPANY,

Petitioner,

vs.

INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA, (AFL),

and

LOCAL No. 68, INTERNATIONAL MOLDERS & FOUNDRY WORKERS UNION OF NORTH AMERICA (AFL),

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court (R 291-302) is reported in 95 F. Supp. 35. The opinion of the Court of Appeals for the Sixth Circuit (R 319-329) is reported in 193 F (2d) 299.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 11, 1951 (R 318). The Order On Petition for Rehearing was filed January 23, 1952 (R 353).

Petitioner invokes the jurisdiction of this Court under 28 U. S. Code Section 1254 (1).

QUESTIONS PRESENTED

The petitioner has not accurately stated the questions that are, or can be, presented to the Court in this case. Actually there are but two questions presented and one of those is purely collateral.

The principle question presented is: Was the jury's verdict rendered in this case supported by substantial evidence?

The collateral question presented is: Does the Ohio Statute of Frauds (Ohio General Code, Section 8621), providing that no action may be brought upon an agreement that is not to be performed within a year from the making thereof unless signed by the party to be charged, apply in an action brought under Section 301 (a) of the Labor Management Relations Act, 1947 (29 U.S.C. 185) for breach of an alleged oral contract that was not to be performed within a year from alleged making thereof:

STATEMENT OF THE CASE

(a) The Subject Matter Of The Case:

This case was brought under Section 301 (a) of the Labor Management Relations Act, 1947 (29 U.S.C. 185).

It involves an alleged breach of a no-strike clause in an alleged oral collective bargaining contract which Petitioner claims each of Respondents had entered into but which Respondents contend was never agreed to nor entered into by either of them.

(b) The Pleadings:

The case was initiated on April 26, 1949, when Petitioner filed a complaint against both Respondents alleging that each of them had entered into a contract on or about March 26, 1949 with Petitioner, and that Respondents had breached that contract (R 1-4). On July 12, 1949 Petitioner filed a More Definite Statement of Claim (R 6-7) to which was attached as "Exhibit A" a written document alleged by Petitioner to be the contract it was relying upon for its cause of action.[1] (A copy of Exhibit A was introduced in evidence as Exhibit 3, R 7, 76).

In the probable absence of a copy of this exhibit being included in the record before this Court, it is necessary to set out its pertinent parts. "Exhibit A" states among other things –

> (1) that it is a contract between the Hamilton Foundry and Machinery Co. and Local 68, International Molders and Foundry Workers Union of North America. (Pg 1);

---

[1] This Exhibit A apparently has not been filed with this Court, as required in Rules 38 (1) and (7), as no copy of Exhibit A, nor any exhibit, received in evidence during the trial of this case is included in the copy of the transcript of the record served on Respondents. Further, there is no indication in the record that the exhibits have been transmitted to the Court in their original form by Petitioner. (Rule 10 (4)). Respondents, in making record reference to exhibits as required in Rule 27 (3), can only refer to original exhibits as transmitted to the Court of Appeals for the Sixth Circuit. (R, 310).

(2) that is was entered into as of the 30th day of March, 1949, effective March 28, 1949. (Pg 1);

(3) that the company would increase the day work rates 5¢ per hour upon the signing of the agreement. (Pg 3);

(4) that it would be in effect until March 27, 1950 and would renew for each succeeding year thereafter in the absence of notice to the contrary. (Pg 18).

This "Exhibit A" (Ex 3) is signed by Peter E. Rentschler on behalf of the Petitioner, but is not signed by any one on behalf of Respondent Local 68 although it designates the names and places for the committee to sign on behalf of Local 68. (Pg 19). Nor is Exhibit A signed by Respondent International Union and, indeed, the exhibit does not even contain a space for any one to sign on behalf of the International Union. (Pg 19).

After the filing of this More Definite Statement of Claim, each of Respondents filed a separate answer setting forth four defenses as follows:

(1) a denial of entering into the alleged contract;

(2) a lack of consideration for the alleged contract;

(3) that the Court had no jurisdiction over the subject matter as Section 301 of the Labor Managment Relations Act is repugnant to Article III, Section II of the Constitution of the United States; and

(4) that the alleged contract was unenforceable by virtue of Section 8621 of the General Code of Ohio since the alleged contract was oral and could not be performed within a year from the alleged making thereof. (R 8-18).

Motions to Dismiss and For Judgment On the Pleading were made and denied (R 19-21).

The case came on for trial and, after its first witness had completed his testimony, Petitioner filed an Amended More Definite Statement Of Claim and therein, abandoned completely its original More Definite Statement Of Claim, wherein it was alleged that the agreement had been reduced to writing and presented to the members of the Union (R 6), and alleged that Petitioner was now relying on an oral contract (R 22). Attached to its Amended More Definite Statement Of Claim and made a part thereof was an Exhibit A, which Respondent then claimed contained the full terms and conditons of the alleged contract except for certain enumerated changes (R 22). This Exhibit A, attached to the Amended More Definite Statement Of Claim was the same written document, signed by Peter E. Rentschler on behalf of the company, that had been attached to the More Definite Statement Of Claim As Exhibit A (Exhibit 3 in evidence, R 23).

When Petitioner had rested its case, each of Respondents made a motion for an instructed verdict, and the reasons in support thereof were fully stated (R 130-135). The motions were denied (R 135) and Respondents proceeded with introduction of testimony to support their respective defenses. When all the evidence was in, Respondents' respective motions for an instructed verdict were renewed and denied (R 249). The matter went to the jury, which found against both Respondents in the amount of $37,500 (R 286).

Respondents then filed separate motions "To Set Aside Verdict And For Judgment For The Defendant In Accordance With Its Motion For A Directed Verdict And In The Alternative For A New Trial" (R 288-290).

The Court granted the motions for judgment and, in the alternative a new trial in the event of a reversal of final judgment (R 304-306).[2]

An appeal was taken to the United States Court of Appeals for the Sixth Circuit (R 307), which affirmed the lower Court (R 318). A petition for rehearing was filed (R 333, et seq) and overruled (R 353).

(c) Summary Of The Evidence:

The evidence submitted during the trial of the case, briefly summarized, establishes the following:

The Respondent Local 68 is a labor union which represents employees in some seven foundries in the area of Hamilton, Ohio (R 140). It is an affiliate of the Respondent International Union (Ex. 21, R 126, 127).

Since the year 1941 the Petitioner company had recognized the Respondent Local 68 as the bargaining representative of a unit of its foundry employees, and from that time through February 28, 1949 the Respondent Local 68 and the Petitioner had entered into and operated under written collective bargaining contracts (Exs. 10, 15, 16; R 89, 98, 99). In February of 1949 negotiations were commenced between Respondent Local 68 and Petitioner for a new contract for the year 1949-50 (Ex. 17, R 99; Ex. 8, R 83).

Throughout these negotiations the committee representing Local 68 made abundantly clear to Petitioner that it had but limited authority to negotiate for contract terms only; that neither it nor any of its members had any authority whatsoever to bind Respondent Local 68 to a contract; and that a contract could be entered into

[2] See Montgomery-Ward & Co. v. Duncan (1940), 311 U. S. 243; 61 S. Ct. 189, 85 L. Ed. 147.

only after the membership of Local 68 had accepted or ratified, by majority vote, any offer made by the company.[3] And admittedly the Petitioner acknowledged and accepted those conditions (Exs. 4, pgs 91-92, 126; Ex. 5, pgs 205, 211, 221, 223, 224, 271, 274, 301, 315, 316, 319; Ex. 6, pgs 3, 4, 34, 65, 66, 75, 83-84; Ex. 7, pgs 3, 4-5, 6, 8, 20, 46, 47; Ex. 8, pgs 2, 21, 61, 62, 63).

The principle issue in dispute during all of the negotiations was the Petitioner's absolute insistence that the union accept for the employees in its plant a new system of computing piece work rates, which admittedly would result in a lower return for the men, and the men's refusal to accept this condition (Ex. 5, pgs 134, 209, 318; Ex. 7, pgs 6-7, 10, 13; Ex. 8, pg 2).

At the conclusion of a negotiation meeting held on March 24, 1949, the committee agreed to submit the company's proposal, still containing the company's new system for computing piece work rates, to the employees of the company. who were members of Local 68, to ascertain if it would be acceptable to them although the proposal had been rejected by them at least twice before (R 141). It was also arranged that one of the committee members would 'phone the company Saturday morning, March 26, 1949, and report on the results of this meeting of the company's employees (Ex. 8, pg 98).

The meeting of the company's employees was held Friday night, March 25, 1949,[4] and the next morning,

---

[3] The manner by which Respondent International Union could accept a contract was not mentioned during the negotiation meeting as, obviously, no one intended that the International Union should be a party to the contract.

[4] The respondents have consistently contended that evidence concerning this Friday night meeting is immaterial since admittedly it was not a meeting of Local 68 (R 64, 208-209).

Saturday, March 26, 1949, McCune, a member of the committee, telephoned the company to report on what occurred at this meeting. The Petitioner's witness, McDaniel, testified McCune stated the proposal had been accepted by the company's employees (R 64-65). McCune testified he told McDaniels the men had voted not to strike and, if the company wanted to put its new wage system into effect on Monday morning, the men would work under it and try it out (R165). It is admitted that the employees of Petitioner were dissatisfied with the company's new system of establishing piece rates as the men suffered reductions in their pay as high as 30% (R 166-168). And it is further admitted that the membership of Local 68, at its regular meeting on Monday evening, March 28, 1949, voted to reject the company's offer and to continue negotiations (R 146, 193; Ex. E proffered in evidence, R 201)[5].

The committee refused to sign the contract the company had prepared (Ex. A of the complaint, Ex. 3 in evidence, R 76). Negotiations were continued during the week but no agreement could be reached (R 103-104). Local 68 struck the plant the following Monday, April 4, 1949 (Ex. F, R 243).

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[5] Petitioner's statement that Local 68 at its meeting on Monday, March 28, 1949, voted to "rescind" the action of the company's employees (Pet. for Cert., pg 9) is a patently misleading statement. It was merely a statement Rentschler testified was made to him by McCune at a meeting held on March 29, 1949 (R 103).

ARGUMENT

1. No Evidence Was Submitted That The Alleged Contract Was Accepted.

The principle issue involved in the trial of the instant case was simply whether or not on March 26, 1949 Respondents had entered into a contract with Petitioner. Both the District Court and the Court of Appeals found that there was no evidence to support Petitioner's contention that the alleged contract had been entered into.

The District Court found a lack of evidence in two respects; first, that there was no evidence in the record that Respondents had accepted the alleged contract (R 299-300); and, second, that the undisputed evidence established that the parties did not contemplate an oral contract and were not to be bound unless and until the contract was reduced to writing and signed. (R 300-301).

The Court of Appeals affirmed the District Court on the grounds that there was no evidence in the record that Respondents had accepted the alleged contract. (R 325). The Court of Appeals held, as a further grounds for affirmance, that the Ohio Statute of Frauds (Ohio General Code, Section 8621), providing that no action shall be brought upon an agreement that is not to be performed within a year from the making thereof unless it is in writing and signed by the parties to be charged, applied and barred recovery on the alleged contract. (R 327).

There definitely is no error in the decision of the Court of Appeals in affirming the District Court on the grounds that the record is devoid of evidence that Respondents accepted the alleged contract.

Petitioner's entire case turned on the 'phone call made on Saturday, March 26, 1949, by a memeber of Local 68's

negotiating committee (McCune) to the Petitioner. The purpose of the 'phone call was to report to Petitioner on the action taken by Petitioner's employees at a meeting they had held on Friday evening, March 25th. (Ex. 8, pg 98) Petitioner's witness, McDaniel, testified he was advised in this 'phone call that "the boys had agreed to our proposal". (R 66) This statement Petitioner contends consummated the alleged contract.

It is agreed, however, by all parties, that the meeting held on March 25th was not a meeting of Respondent Local 68, but a meeting of only those members of Local 68 who worked at Petitioner's foundry. (R 143, 164, 187-188, 212, 230) It is also undisputed and agreed to by all parties that the Respondent Local 68 rejected the company's proposal at its regular meeting held on Monday night, March 28th. (R 146, 193; Ex. E proffered in evidence R 189). Thus no contract could have been accepted by the Respondent Local 68 since the uncontradicted evidence establishes that Local 68 would not be bound by any contract unless and until accepted by a majority vote of the members of Local 68. That condition was known to and accepted by Petitioner, as conclusively demonstrated by Petitioner's Exhibit 7, pg 5, containing a statement made by Mr. Rentschler to Local 68's bargaining committee in which he quoted from a letter sent to each of the employees as follows:

> "Agreement with the Molders Union. Last Thursday the Company and the *Union Committee of Local 68* with the District Representative of the International Molders and Foundry Workers Union came to an agreement on a new one-year contract effective Monday, March 14. The agreement is to be presented to the *Local Union membership* for ratification and the

> meeting has been set up for Friday afternoon, March 11, for the Company and the Union Committee with the District Representative to sign."

Mr. Rentschler followed this quotation from his letter by emphasizing that it was his understanding that a contract could be made only upon its acceptance or ratification by the membership of Local 68. He used the following language: "Now we say there subject to ratification of the union membership" (Ex. 7, pg 5).

The record is thus clear and uncontradicted that no contract was accepted since the membership of Local 68 not only refused to accept the company's offer but rejected it (R 146, 193; Ex. E proffered in evidence, R 201).

Petitioner's comments (Pet. for Writ, pgs 12-13) that there was ample evidence in the record that the vote of the employees' meeting on Friday night, March 25th, was to be decisive is untenable.

In support of its statement, Petitioner first states that the Constitution and By-Laws of the Respondent Unions do not require acceptance of a contract by the membership of a local union. This is directly contrary to the facts as shown in Exhibit 20, Section 66, page 34, wherein reference is constantly made to meetings of the membership of local unions to determine wage demands, actions to be taken on employers' proposals, etc.

Second, Petitioner refers to testimony of Rentschler and Fracker (R 203-204) that no one told them that ratification by the membership of Local 68 was necessary to consummate a contract. It would hardly seem necessary that these officials of Respondent would have to be told that Local 68 would have to accept or ratify the contract since (1) they certainly knew they were negotiating with

Local 68 (as evidenced by the title on the covers of Exhibits 4, 5, 6, 7 and 8); (2) since they certainly knew that any contract entered into would be entered into with Local 68 (as evidenced by Exhibits 3 and 19); (3) since they certainly knew that any proposed agreement was to be presented to the membership of Local 68 for ratification prior to its becoming a binding contract (as established by the letter Mr. Rentschler had written to his employees) (Ex. 7, pg 5); and (4) the Exhibits 4, 5, 6, 7 and 8 established that Mr. Rentschler was told over and over again, and acknowledged over and over again, that only the majority of the general membership of Local 68 could bind the Union to a contract. (References to pages in Exhibits, 4, 5, 6, 7 and 8 are voluminous and appear supra pg 7).

Third, Petitioner refers to testimony of McCune, Sample, the International President of the Respondent International Union, and Harding, a member of Local 68's negotiating committee (R 171, 199-200, 145). Here Petitioner has resorted to the age-old trick of attempting to take statements from their context to give them a meaning never intended and, indeed, exactly contrary to what was actually stated. The testimony referred to by Petitioner is simply testimony to the effect that the Friday night meeting on March 25th was not a meeting of Local 68 but of only the company's employees, and the company's offer was going to be submitted to the company's employees for their approval or rejection prior to submitting the proposal to the membership of Local 68.

The testimony of these witnesses is clear and certain that the membership of Local 68 would have to accept or ratify any action of the committee, or company's employees, before a contract could be made with Local 68 (R 175, 176, 198, 145).

Naturally, if the employees of the company found any proposal from the company acceptable to them, the membership of Local 68 would be strongly inclined to accept, if not, not.

2. The Alternative Basis For Affirmance Is In Accord With Decisions Of This Court and Does Not Conflict With Other Decisions.

The second, or alternative, basis upon which the Court of Appeals affirmed the District Court, i.e., the Ohio Statute of Frauds, is clearly in accord with the decisions of this Court and the decisisons of other United States Courts of Appeals.

It has long been established that where Congress is silent in adopting federal legislation, state statutes of a remedial nature apply. As stated by this Court in the case of *Holmberg* v. *Armbrecht* (327 U.S. 392 at 395; 66 S. Ct. 582; 90 L. Ed. 743):

> "Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. (cases cited).

Further, state laws are superseded by federal legislation only in those instances where Congress has clearly indicated its intent that state laws are to be superseded, or in those instances and to the extent that state laws conflict and prevent operation of federal acts. (*Minnesota Rate Cases,* 230 Ct.S. 352; 33 S.Ct. 729; 57 L.Ed. 1511; *Allen Gradley Local* 1111 v. *Wisconsin Employment Relations Board,* 315 U.S. 740; *International Union UAW-AFL* v. *Wiscon-*

sin Employment Relations Board, 336 U.S. 245; 59 S.Ct. 516; 93 L.Ed. 651 *Republic Pictures Corp.* v. *Kappler,* 151 Fed (2nd) 543, affirmed 327 U. S. 757).

The silence of Congress in enacting Section 301 of the Labor Management Relations Act, 1947 certainly indicates an intent that state laws of a remedial nature apply for it is inconceivable that Congress intended to wipe out, by implication only, historic state statutes of frauds and limitations.

Petitioner's contention (Pet. for Cert., pg 10) that the decision of the Court of Appeals in the instant case, insofar as it holds the Ohio Statute of Frauds applicable, conflicts with the decision of the United States Court of Appeals for the Third Circuit in the case of *Rothenberg* v. *Rothstein* (183 F (2d) 524) is without merit. In the Rothenberg case the Court held that the Pennsylvania Sales Act would be applicable "if the federal act has adopted it as a limitation upon the remedy granted by that act," and went on to find that Congress had not intended the state act to apply.

The federal legislation involved in the Rothenberg case was an entirely different act than that involved in the instant case with the Court finding that Congress intended the Federal Perishable Agricultural Act (7 USC 499 et seq) to supersede state laws. No such intent, however, can be found in the Labor Management Relations Act, 1947.

Nor is Petitioner's contention (Pet. for Cert., pg 9) tenable that compliance with state statutes of frauds is unnecessary under the Labor Management Relations Act 1947 because Section 8 (d) of the Act makes signature of collective bargaining agreements mandatory.

Section 8 (d) is in Title I of the Act, and no private rights but only public rights are created by Title I of the

Act (*Schattle* v. *International Association of State Employees,* 70 Fed. Sup. 1008, affirmed (CCA 9) 165 F (2) 216, Cert. denied 334 U. S. 812).

Further, insofar as the instant case is concerned, the National Labor Relations Board has already found that Respondents herein did not violate Section 8 (d) of the Act by refusing to sign the contract Petitioner is herein alleging Respondents had entered into. The Board found the contract was not accepted by Respondents, *In re International Molders & Foundry Workers Union of North America, (A. F. of L.) and International Molders & Foundry Workers Union of North America, Local* 68 v. *The Hamilton Foundry & Machine Co.* (1950) 91 NLRB 139.

3. No Question Of Interpretation Of Language Of Federal Law is Involved.

Petitioner contends that the instant case raises a question concerning the interpretation of Sections 2 (13), 301 (b) and 301 (e) of the Labor Managment Relations Act, 1947 which define the liability of a labor organization for the acts of its agents. That question, however, is not involved in the instant case and was never an issue during the trial of the case nor on appeal. Respondents concede that under the provisions of the Act a labor union is bound by the acts of its agents.

Section 301 (b) of the Act provides that a labor organization "shall be bound by the acts of its agents."

Sections 2 (13) and 301 (e) provide "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question as to whether the specific acts performed

were actually authorized or subsequently ratified shall not be controlling."

This language in the Act merely defines the common law agency relationship as distinguished from the definition of agency contained in the Norris-LeGuardia Act (47 Stat 71, 29 U.S.C. 106).

Proof of agency under the Act must be made in the same manner that such proof is required in the ordinary law suit.

In the Statement of The Managers on The Part of The House the following comment is found on the agency test provided for in the Act:

> "Hence, under the conference agreement, as under the House Bill, both employers and labor organizations will be responsible for the acts of their agents *in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)*." (Vol. 1, Legislative History, Labor Management Relations Act, 1947, pg 540.)

(See also Congressional Record, Senate, June 5, 1947, page 6598, 6599 (Vol. 2, Legislative History of the Labor Management Relations Act 1947, pgs 1535, 1573); Congressional Record, Senate, June 6, 1947, page 6680, (Legislative History Vol. 2, pg. 1599); Congressional Record, Senate, June 6, 1947, page 6693, (Vol. II, Legislative History, pg. 1617); and Congressional Record, Senate, June 12, 1947, pg 7000 (Vol. II, Legislative History, page 1622).)

The uncontradicted evidence in the instant case establishes overwhelmingly that neither McCune nor any other member of Local 68's negotiating committee, nor any segment of Local 68, had the authority to bind Local 68 to a contract. Their authority was limited to negotiating for

contract terms. Only the membership of Local 68, by majority vote, could bind the union and Petitioner knew of and accepted that restriction of the authority of the negotiating committee. (See Supra, pg 10, also Ex. 4, pgs 91-92, 126; Ex. 5, pgs 205, 211, 221, 223, 224, 271, 274, 301, 315, 316, 319; Ex. 6, pgs 3, 4, 34, 65, 66, 75, 83-84; Ex. 7, pgs 3, 4-5, 6, 8, 20, 46, 47; Ex. 8, pgs 2, 21, 61, 62, 63).

Thus it is clear that Petitioner knew it was dealing with a committee of limited authority and one that had no authority to bind its principal to a contract. No question involving the interpretation of Sections 2 (13), 301 (b) and 301 (a) of the Act can be involved.

The decision of the United States Court of Appeals for the Seventh Circuit in the case of *NLRB* v. *Acme Mattress Company* (CCA 7) (1951) 192 F (2) 524, does not conflict with the decision of the Court of Appeals in the instant case concerning proof of agency under the Labor Management Relations Act, 1947 (Pet. for Cert. pg. 11). In the Acme Mattress Company case the Court found that "No limitation was communicated to the Company with respect to Cline's (the union's agent) apparent authority to impart to the Company the terms and conditions upon which the International would execute the contract and terminate the strike," and, since Cline had apparent authority to contract, the Court held the union bound by his acts.

In the instant case, however, the limitation on the authority of the committee was imparted to the Petitioner and acknowledged and accepted by the Petitioner. Therefore, there is no conflict between the Court of Appeals' decision in the instant case and the decision of the Seventh Circuit in the Acme Mattress Company case.

(See also Harroll-Owens Co. and International Association of Machinists, Lodge 1506 (92 NLRB No. 32).)

4. Interpretation Of Rule 10(c) Federal Rules Of Civil Procedure Is Not Involved.

Petitioner's contention that the instant case presents an important Federal question relating to the meaning of Rule 10 (c) of the Federal Rules of Civil Procedure is untenable.

In its Amended More Definite Statement Of Claim, Petitioner alleged that the termination of the contract it was relying upon was midnight March 26, 1950. It attached to its pleading an Exhibit A (Ex. 3). This Exhibit 3 provides that it is to be in effect until March 27, 1950, and is to renew for each succeeding year thereafter in the absence of notice to the contrary.

The Court of Appeals held:

> *"In addition to there being no evidence about a contract with a termination date of midnight March 26, 1950,* the exhibit contradicted the allegations of the Amended Complaint and was controlling." (R 328)

There was not one word or shred of evidence introduced concerning a contract to terminate midnight March 26, 1950, and, as found by the Court of Appeals, all of the evidence was to the effect that if the alleged contract had been entered into its expiration date of March 27, 1950 was intended to be a day included in the contract. Therefore, it could not be performed within a year from the date Petitioner alleged it was entered into.

The Court of Appeals' statement that "Appellant's (Petitioner) pleadings and evidence provide much confusion about the length of time covered by the alleged contract involved in this case" (R 327) is certainly borne out and conclusively demonstrates that from the very inception of the instant case Petitioner has been grasping at straws, and

its Petition for Writ of Certiorari is completely lacking in substance.

Petitioner has claimed in successive pleadings and commitments as its contract:

> (1) A contract reduced to writing and entered into March 26, 1949, to terminate midnight March 26, 1950. (More Definite Statement Of Claim) (R 6-7)
>
> (2) A contract entered into March 30, 1949 effective until March 27, 1950, and year to year thereafter. (Exhibit A to More Definite Statement (Ex. 3))
>
> (3) An oral contract entered into to terminate midnight March 26, 1950. (Amended More Definite Statement of Claim, R 22)
>
> (4) A written document. (Exhibit A to Amended Statement of Claim (Ex. 3))
>
> (5) A written document embodying an agreement which had been reached, which takes Petitioner back to its Exhibit A as that was the document prepared after March 26, 1949 (R 120-121). (Pet. for Cert., Pg 5)
>
> (6) A contract entered into on March 11, 1949 effective until March 13, 1950, although that proposal admittedly was rejected (R 109). (Ex. 19, Pet. for Cert., Pg 14)
>
> (7) A contract entered into on March 26, 1949 effective until March 13, 1950. (Pet. for Cert., Pg 14)

Thus Petitioner has shifted from alleged contract to alleged contract as appeared expedient.

No matter how often Petitioner shifted its position, it could prove no contract because, in fact, no contract was entered into.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit is based upon ordinary principles of contract law with no probability of error. The decision does not conflict with the decision of this or any other court, nor does it raise any important or fundamental questions. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 14, 1952.

APPENDIX A

STATUTES AND RULES

OHIO GENERAL CODE, SECTION 8621.

"No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default or miscarriage, of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in, or concerning them nor upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

SECTION 301, LABOR MANAGEMENT RELATIONS ACT (29 USC 185)

"(a) Suits for violation of contracts between an employer and a labor organizaton representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom

it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, 3:17 p.m., E.D.T., c. 120; Title III, § 301, 61 Stat. 156."

SECTION 2(13), LABOR MANAGEMENT RELATIONS ACT 1947 (29 USC 152(13).)

"In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 137."

SECTION 8(d), LABOR MANAGEMENT RELATIONS ACT 1947 (29 USC 158 (d).)

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, and provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2) - (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 159 (a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. As amended June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1 (b), 65, Stat. 601."

RULE 10(c), FEDERAL RULES OF CIVIL PROCEDURE.

"Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."